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IN THE

Supreme Court of the United States

No. 74-147

OCTOBER TERM, 1974

AAACON AUTO TRANSPORT, INC.,

Petitioner,

v.

HONORABLE MORRIS E. LASKER,

Respondent.

REPLY TO THE MEMORANDUM AMICUS RURIAE.

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TABLE OF CONTENTS

Page

Introductory Comment 1

The Memorandum Amicus Is In Error Concerning The Events Subsequent To Judge Lasker's Decision Invoking The Doctrine Of Primary Jurisdiction 2

The Other Issues Raised In The Memorandum Amicus Are Both Erroneous And Irrelevant To The Issue Before This Court 4

Conclusion 7

CITATIONS

Aaacon v. Gale, Docket #72 Civ. 239 (SDNY, 1972) .. 5

Aaacon v. Jacobsen, 475 F2d 1394 (3rd Cir. 1973) 4

Aaacon v. Levine, 1456 F2d 1335 (2nd Cir. 1971) 4

Aaacon v. Teafatiller, 334 F. Supp. 1042 (SDNY, 1971) 4

Ex Parte 263, 340 ICC 515, (1972) 5

Luckenbach v. McCahon Sugar Ref. Co., 248 U.S. 139 6

page

Phoenix Insurance Co. v. Erie Transporation Co., 117 U.S. 312 6

United States v. Auto Drieveaway, 464 F2d 1380 (7th Cir. 1972) 6

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REPLY TO THE MEMORANDUM AMICUS CURIAE

INTRODUCTORY COMMENT

Petitioner's Reply Memorandum is submitted in response to the Memorandum Amicus Curiae filed by Nicholas LaGinestra, Esq., of LaGinestra & Donnelly, attorneys for J. Wayland Thomas and Cora G. Thomas, respondents below. Although the Memorandum Amicus contains no legal authorities and does not address itself to the issue before this Court—the question of the propriety of issuance of a writ of mandamus—petitioner nevertheless feels constrained to reply thereto to correct certain distortions contained therein.

THE MEMORANDUM AMICUS IS IN ERROR CONCERNING THE EVENTS SUBSEQUENT TO JUDGE LASKER'S DECISION INVOKING THE DOCTRINE OF PRIMARY JURISDICTION

The Memorandum Amicus, no doubt through an inadvertence, misrepresents the facts subsequent to Judge Lasker's decision invoking the doctrine of primary jurisdiction. The facts, which are set forth more fully in the Petition for Writ of Certiorari, are that subsequent to his original decision of June 14, 1973, (Appendix 1 of Petition for Writ of Certiorari), Judge Lasker had been misinformed by LaGinestra & Donnelly that the Interstate Commerce Commission had rendered a decision adverse to petitioner, Aaacon Auto Transport, Inc. This was incorrect. The true facts were that the Commission had not rendered a decision. Merely, a hearing examiner had issued a summary of evidence which he forwarded to the Commission for its review of the facts de novo, pursuant to the provisions of the Administrative Procedure Act. No decision thereon has ever been rendered by the Commission, although the proceeding has been in progress for over three and a half years.

However, based on that misinformation, Judge Lasker issued a Memorandum Endorsement of December 10, 1973, dismissing Petitioner's petition below. (Appendix 2 of Petition for Writ of Certiorari). This led to the letter of Ralph Zola, Esq., of December 12, 1973, which is reproduced in the Memorandum Amicus. A reading of the

full text of that letter, rather than the small portion excerpted in the body of the Memorandum Amicus, indicates that the writer was not agreeing to be bound by the prior decision of Judge Lasker of June 14, 1973 (in which Judge Lasker invoked the doctrine of primary jurisdiction). Rather, in that letter, Petitioner therein set forth the true facts, noted above, concerning the status of the proceeding before the Commission, and informed Judge Lasker that he had been wrongfully advised by LaGinestra & Donnelly. Petitioner requested that the decision of Judge Lasker, which was based upon this misinformation, be reconsidered. Accordingly, thereafter, on March 14, 1974, Judge Lasker wrote a letter acknowledging this error and restoring the effect of the prior decision of June 14, 1973. (Appendix 3 of Petition for Writ of Certiorari).

At no time did Aaacon Auto Transport, Inc., or its attorneys, agree to a stay of determination of the petition below on the basis of the doctrine of primary jurisdiction or otherwise. The sole agreement that Judge Lasker sought was the single commitment from LaGinestra & Donnelly that a prior action commenced by respondents below in the courts of Pennsylvania, be held in abeyance pending an ultimate determination by the New York District Court of Petitioner's petition below.

THE OTHER ISSUES RAISED IN THE MEMORANDUM AMICUS ARE BOTH ERRONEOUS AND IRRELEVANT TO THE ISSUE BEFORE THIS COURT

Similarly, the other issues raised in the Memorandum Amicus are not germane to the determination by this Court as to whether a Writ of Mandamus should be issued directing Judge Lasker to make a decision in the case below. Rather, the matters raised in the Memorandum Amicus are more appropriately addressed to a determination by Judge Lasker, should he be required to act.

However, to complete the record, Aaacon must respectfully note that the lawfulness and validity of the exact arbitration provision contained in Aaacon's Bill of Lading has been sustained on many occasions by Federal courts throughout the United States, including the Second and Third Circuit Courts of Appeal. Thus, in *Aaacon v. Jacobsen*, 475 F2d 1394 (3rd Cir. 1973) and *Aaacon v. Levine*, 1456 F2d 1335 (2nd Cir. 1971), both Courts of Appeal affirmed orders of the U.S. District Court specifically upholding the lawfulness and validity of the arbitration provision here in question. Cf. *Aaacon v. Teafatiller*, 334 F. Supp. 1042 (SDNY, 1971).

Regarding arbitration in New York, this places no burden whatsoever on the parties where, as here, the real party in interest is an insurance company with offices and counsel in New York. And further, arbitration may be had

speedily and inexpensively on documents alone, without the necessity of either party traveling, obtaining counsel, appearing personally or having witnesses appear personally, when they reside more than 100 miles away. Cf. New York Civil Practice Law and Rules, Sec. 3117. This procedure has been followed in *Aaacon v. Gale,* Docket # 72 Civ. 239 (SDNY, 1972) per Frankel, J.

In this regard, the Interstate Commerce Commission itself has proposed legislation requiring arbitration of all shipper claims. *Ex Parte 263,* 340 ICC 515, 595 (1972):

> "The mechanics of an operation (arbitration) of such national scope are not clearly as staggering as they might first appear. The vast majority of loss and damage claims can be resolved on the basis of the documentary evidence . . . . "

Regarding the issue of the enforcement of the terms of the bill of lading agreement in arbitration, Aaacon respectfully notes that the terms of the bill of lading are dehors the record and not germane to the question of the issuance of a writ of mandamus. However, it is respectfully observed that the bill of lading recites pertinent portions of the federal law applicable to the interstate carriage of goods. Thus, determination by arbitration is required to be in conformity with the federal law governing the interstate transportation of goods. In this regard, the Interstate Commerce Commission itself, in commending arbitration of shipper claims, has stated that arbitration must be had in accordance with federal carrier law. *Ex Parte 263,* 340 ICC 515, 582 (1972).

Finally, LaGinestra & Donnelly's assertions concerning benefit of insurance and the rights of their client, the insurer, are also erroneous, dehors the record and not germane to the issue before this Court. However, Petitioner respectfully notes that automobile driveaway carriers, such as the petitioner herein, are entitled to the benefit of insurance effected upon the vehicle, both under the provisions of the Uniform Straight Bill of Lading and under the authority of a recent decision by the Seventh Circuit Court of Appeals in *United States v. Auto Driveaway*, 464 F2d 1380 (7th Cir. 1972). In that case, the Court noted that driveaway carriers of automobiles, such as petitioner, are entitled to the benefit of insurance on the vehicles because of the unusual nature of the commodity being shipped: private automobiles which are insured prior to transport. The Seventh Circuit noted that, what distinguishes these vehicles from other cargo in interstate movement, was the fact that the vehicles had been insured by the shippers thereof for their own general purposes, and not for transportation. Cf. *Phoenix Insurance Co. v. Erie Transportation Co.*, 117 U.S. 312; *Luckenback v. McCahon Sugar Ref. Co.*, 248 U.S. 139. The provisions concerning insurance in the instant bill of lading agreement do not prevent subrogation, but rather, mitigate the shipper's damages by the amount of the insurance proceeds insofar as it does not void the policy.

Petitioner respectfully reiterates that the foregoing considerations are not germane to the legal issue before this Court, and are only relevant for consideration by Judge Lasker, should he be required to act.

CONCLUSION

For the reasons previously stated in the Petition, the Court should grant the Petition for a Writ of Certiorari to review the denial of the Petition for a Writ of Mandamus.

Respectfully submitted,

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